No. 12864

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. B. S. Steel and Forge, a corporation,

Appellant,

vs.

Gordon W. Shultz, Ernest Puetz, Lee McCoy, Howard Lane, and Harold W. Gentis,

Appellees.

BRIEF FOR APPELLEES GORDON W. SHULTZ AND ERNEST PUETZ.

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TABLE OF AUTHORITIES CITED.

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Restatement of Portion of Pleadings.

It will be observed from a reading of the Third Party Complaint [R. p. 20, par. IV] that

> "*If* defendant C. B. S. Steel and Forge is liable * * * it is because of the negligence or other misconduct of * * * third party defendants * * *."

And alleging further

> "and it was *their duty* (naming third party defendants) to cause defendant C. B. S. Steel and Forge to keep accurate and complete records of over-time worked and to pay employees * * *" etc. (Italics supplied.)

ARGUMENT.

Third Party Defendants contend that the trial court is supported in its Judgment of Dismissal of the Third Party Complaint upon two distinct grounds.

Firstly: Appellant Has Failed to Allege or State a Claim Upon Which Relief Can Be Granted.

It is respectfully submitted that while said third party complaint alleges that it *was the duty* of third party defendants to cause the corporation to keep records, nowhere does said third party complaint allege that third party defendants *failed* to keep such records. It is obvious that the *only* basis upon which the defendant corporation's officers can personally be held liable to the corporation, is upon an act of culpable negligence, amounting to misconduct, and *that* misconduct can *only* be a failure to keep records, and obviously that failure must be alleged.

Secondly: The Trial Court Was Without Jurisdiction to Consider Such a Speculative Cause of Action, Involving as It Does, Matters Which Are Entirely Separate and Distinct, and Factually Involve an Issue Not Embraced Within Third Party Complaint.

The third party complaint is obviously speculative. The charging allegations begin with an *"If"* plaintiff is entitled to relief; it proceeds by alleging that the third party defendants are no longer connected with defendant Steel Company, stating that defendant "Shultz *was* president, Puetz *was* comptroller, and McCoy *was* forge shop superintendent." and concludes by alleging that it was the *"duty"* of such individuals to keep certain records. (Italics supplied.)

It appears at first blush that, even had appellant alleged what would ordinarily constitute a cause of action, the factual situation of such a third party complaint goes far afield of presenting an identical situation as that alleged by the plaintiff.

The appellant has failed to differentiate between those cases which ordinarily come with the purview of causes which may be impleaded by third party plaintiffs in the Federal Courts, and the factual situation of the third party complaint herein.

Upon a reading of the cases which involved third party complaints, it is observed that in every instance such impleading has involved facts and circumstances, which *ipso facto* charged third party defendants with negligence, and from which negligence there was no escape, in that, in such cases, the matter in issue when presented directly addressed itself to the main point in issue.

Such was the case of *Greenleaf v. Huntington R. R.*, 3 F. R. D. 24, cited by appellant. That was a case of the negligent operation of a train and the railroad company brought in the engineer and conductor by impleading, charging them with negligence. The proof by plaintiff of negligence of the railroad company, of necessity involved at once the engineer and conductor, and once negligence was proven, the identical factual situation required no further or added hearing on the part of the trial court.

The question at once presents itself in the case at bar. Would a judgment in favor of plaintiffs and against defendant Steel corporation, confined to the pleadings of plaintiff's complaint, be applicable to third party defendants, officers of defendant corporation, and require no

further hearing or presentation of evidence, in order to find that third party defendants were liable to plaintiff, or even to third party plaintiff? The answer seems to be evident in the negative. Upon the conclusion of giving of evidence by plaintiffs, in the case at bar, and which (for argument's sake say) would immediately justify a judgment against the corporation, the Court would then be compelled to embark upon a lengthy trial to determine the individual claim of the corporation, as against its officers, and against each one of them individually. Unlike the *Greenleaf* railroad case, *supra,* the plaintiff therein, by the presentment of his evidence against the railroad company, if sufficient, was entitled to a judgment against the railroad company as such, and likewise against its employees. The railroad company, as such, would have no cause of action as against its employees for their negligence. And therein lies the distinction. In the case at bar the plaintiff, under no theory, would be entitled to offer evidence, or obtain the benefit of, the negligent actions of the officers of the corporation in failing to keep proper records. Such a cause accrues only to the third party plaintiff, and constitutes a separate, distinct issue, would or could involve an extended trial in itself, after the major issue of failure to pay wages had been fully litigated, and in which proceeding the plaintiff at bar would not and could not be interested, involved, or directly benefited. The result of such an extended hearing might, or might not, alleviate the corporation's indebtedness, because of a judgment rendered in favor of

plaintiff. The trial of the third party plaintiff's cause of action could involve many questions of law and fact, defenses, satisfactions and accords, releases, participation of present officers and directors of defendant corporation in keeping or participating in keeping records, hiring of plaintiffs and payment of wages, all of which plaintiff herein is not and could not be, under the law concerned with. The United States District Court, likewise, is not concerned with such matters, but the third party plaintiff is left solely to its remedy and relief in the State Courts, which have jurisdiction of such matters.

It can readily be seen where impleading is proper in cases of indemnity, where a trial of the original issue *pronto* relates itself to, binds, the indemnitor. Such as the case of *Pearce v. Penn. R. Co.,* 7 F. R. D. 420, and likewise in *Kelly v. Penn. R. R.,* 7 F. R. D. 524.

In conclusion appellees are impressed with the logic, law and reasoning, more particularly as enunciated in the case of *United States v. Jollimore, et al.* (Holland Furnace Co., Third Party Defendant), 2 F. R. D. 148.

The last cited case was where defendant had signed and delivered a note to Holland Furnace Co., and such note was assigned to the plaintiff, United States. Action was brought against defendant Jollimore on the note. Jollimore brought in Holland Furnace Company alleging damage for breach of warranty. The Court, in dismissing the third party complaint, said:

> "It is clear that no liability of the third party defendant exists on this note to the plaintiff * * * Any liability of the third party defendant to the defendants is independent of the assertions of the claim of the United States and would therefore appear not

to be a liability 'for all or part of the plaintiff's claim against him.' To allow the impleading of this third party defendant would be to introduce a new and separate controversy into the proceedings * * * In the present case, the impleading of the third party defendant would require the trial of issues in no way involved in the controversy between the plaintiff and defendant. No greater convenience would be attained by trying the two sets of issues involved together. In such a case there is no reason for an exercise of discretion that results in holding that Rule 14 should apply to permit a joinder of actions."

Conclusion.

It is respectfully submitted that the District Court's judgment should be affirmed.

Respectfully submitted,

LYLE W. RUCKER,

Attorney for Appellees Shultz and Puetz.